UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

vs. **8:18-CR-346 (MAD)**

JOSE EDUARDO LOPEZ-HERNANDEZ,

Defendant.

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Mae A. D'Agostino, U.S. District Judge:

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

On October 17, 2018, Defendant was charged by indictment with conspiracy to commit alien smuggling in violation of 8 U.S.C. §§ 1324(a)(1)(A)(1) and (a)(1)(v)(1), five counts of alien smuggling in violation of 8 U.S.C. § 1324(a)(2), and one count of transporting aliens for financial

gain in violation of 8 U.S.C. § 1324(a)(B)(1). *See* Dkt. No. 18 at 1-4. Defendant pleaded not guilty to all charges on October 18, 2018. *See* Dkt. No. 24 at 1.

On January 18, 2019, Defendant moved pursuant to Rule 12(b) of the Federal Rules of Criminal Procedure to suppress evidence obtained from a search of his iPhone. *See* Dkt. No. 36 at 1. In the motion, Defendant argues that the evidence should be suppressed because he did not voluntarily consent to the search. *See* Dkt. No. 36-1 at 3-4. The Government opposed that motion on February 6, 2019, and Defendant filed a Reply. *See* Dkt. Nos. 39, 40-2.

For the following reasons, the Motion to Suppress is denied in its entirety.

II. BACKGROUND

Defendant is a citizen of Guatemala with a high school education. *See* Dkt. No. 40-1 at ¶ 2. Defendant's native language is Spanish; he cannot read English but speaks and understands "only a minimal amount of English." *See id.* at ¶ 3. Defendant came to the United States in 2017 on a tourist visa and remained in the United States after his visa expired. *See id.* at ¶ 4.

A. The Arrest

On August 22, 2018, at approximately 3:14 a.m., United States Border Patrol Agents ("Border Patrol") stopped a vehicle registered to Defendant after they observed it traveling north towards the border in Chateauguay, New York, heard doors shutting, and saw the same car traveling south from the border a few minutes later. *See* Dkt. No. 39-1 at ¶ 4; Dkt. No. 40-1 at ¶ 5. The vehicle initially pulled over for Border Patrol, but sped away as Border Patrol approached. *See* Dkt. No. 39-1 at ¶ 5; Dkt. No. 40-1 at ¶ 5.

The driver crashed the vehicle shortly after driving away, and Defendant, who was a passenger in the car, fled the scene before law enforcement arrived. *See* Dkt. No. 40-1 at ¶ 5. When Border Patrol located the vehicle at approximately 3:27 a.m., they found two of the

occupants still inside. *See* Dkt. No. 39-1 at ¶ 6. After searching for the remaining occupants throughout the morning, Border Patrol found Defendant at approximately 9:00 a.m. *See id.* at ¶ 6; Dkt. No. 40-1 at ¶ 5. Border Patrol took Defendant into custody, seized his iPhone, and transported him to the United States Border Patrol Station (the "Station") in Burke, New York. *See* Dkt. No. 39-1 at ¶ 7; Dkt. No. 40-1 at ¶ 5.

Defendant was twenty years old at the time of his arrest. Dkt. No. 40-1 at ¶ 2. He had no prior contact with law enforcement, no knowledge of the criminal justice system in the United States, and no knowledge of the rights guaranteed to individuals in the United States by the laws and United States Constitution. *Id.* at ¶ 4.

B. The Interview

While Defendant was at the Station, he was interviewed by Border Patrol Agents Charlie Toledo and Matthew DeShane. *See* Dkt. No. 39-1 at ¶ 7. Agent Toledo, who is fluent in Spanish, conducted the entire interview in Spanish.[1] *Id.* at ¶¶ 2, 7-8. The interview took place in an interview room with painted brick walls, a metal table, metal chairs, and a telephone. *Id.* Agents Toledo and DeShane were wearing plain clothes and their firearms were not visible during the interview. *Id.*

At the start of the interview, Agent Toledo explained Defendant's *Miranda* rights to him, and Defendant signed a *Miranda* waiver that was written in Spanish. *Id.* at ¶ 8. Defendant then identified his iPhone and Agent Toledo said, in Spanish, "If you're telling me the truth, then you'll give us permission to check your phone. I know it's not charged but when we get it charged?" *Id.* at ¶ 9. Defendant responded "Ok" and gave Agent Toledo the passcode to unlock his iPhone. *Id.*

[1] Agent Toledo reviewed an audio recording of the interview and provided a translated version of his conversation with Defendant in his affidavit. *See* Dkt. No. 39-1 at ¶¶ 7, 9.

Agent Toledo then wrote "IPhone 7 white" on a consent form and told Defendant "This form just states that you give us permission to check your phone with the passcode provided with your permission. Your signature here please." *Id.* at ¶ 10. Defendant signed the consent form at 11:35 a.m. *Id.* at ¶ 11. On September 12, 2018, the Government extracted the data from Defendant's iPhone. *Id.* at ¶ 13.

Although Defendant admits that his signature is on the consent form, he claims that he does not remember signing it because he had been awake for 28 hours straight when he signed the form. *See* Dkt. No. 40-1 at ¶¶ 6, 7 (stating that he had not slept between approximately 7:30 a.m. on August 21, 2018 and when he signed the consent form on August 22, 2018).

III. DISCUSSION

A. Legal Standard

The Fourth Amendment protects the "right of the people to be secure in their persons . . . against unreasonable searches and seizures." U.S. Const. amend. IV. "The touchstone of . . .[the] . . . analysis under the Fourth Amendment is always the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security." *Pennsylvania v. Mimms*, 434 U.S. 106, 108-09 (1977) (internal quotation marks omitted). This reasonableness inquiry generally entails "assessing, on the one hand, the degree to which [a search] intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Virginia v. Moore*, 553 U.S. 164, 171 (2008).

Although a search conducted without a warrant is "presumptively unreasonable," *see Ruggiero v. Krzeminski*, 928 F.2d 558, 563 (2d Cir. 1991), consent to the search is one exception to the warrant requirement, *see Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973). "The government has the burden of proving consent voluntarily given by a preponderance of the

evidence." *United States v. Calvente*, 722 F.2d 1019, 1023 (2d Cir. 1983) (citing *Bumper v. North Carolina*, 391 U.S. 543, 548-49 (1968)). Consent "is not to be lightly inferred," and is not voluntary "if it is the product of duress or coercion, actual or implicit." *United States v. Como*, 340 F.2d 891, 893 (2d Cir. 1965) (internal citations omitted).

To ascertain whether consent to a search was voluntary, the court must examine the "totality of all the circumstances," and may consider factors such as overt or threatened use of force, whether any promises were made, the defendant's age, education, intelligence, knowledge of the right to refuse consent, and whether the defendant was a newcomer to the law. *See Schneckloth*, 412 U.S. at 226-27; *United States v. Watson*, 423 U.S. 411, 424-25 (1976). "The test for voluntariness is whether the 'consent' was the product of 'an essentially free and unconstrained choice' or whether the person's will was 'overborne and his capacity for self-determination critically impaired.'" *United States v. Amry*, No. 02-CR-612, 2003 WL 124678, *4 (citing *Schneckloth*, 412 U.S. at 225). Courts look out for "subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents." *Schneckloth*, 412 U.S. at 229. A voluntary consent must be "unequivocal, specific, and intelligently given." *Como*, 340 F.2d at 893 (internal citations omitted).

The Supreme Court has "rejected in specific terms the suggestion that police officers must always inform citizens of their right to refuse when seeking permission to conduct a warrantless consent search." *United States v. Drayton*, 536 U.S. 194, 206 (2002); *see also Amry*, 2003 WL 124678, at *3 (noting that "[t]here is no requirement that the person giving consent be informed or understand that he has a right to refuse to consent"). In *Drayton*, the Court explained:

> In a society based on law, the concept of agreement and consent should be given a weight and dignity of its own. Police officers act in full accord with the law when they ask citizens for consent. It reinforces the rule of law for the citizen to advise the police of his

> or her wishes and for the police to act in reliance on that understanding. When this exchange takes place, it dispels inferences of coercion.

Drayton, 536 U.S. at 207. Still, the lack of awareness of the right to refuse consent "is one factor to be taken into account" when determining whether consent to a search was voluntary. *Id.* at 206-07; *Amry*, 2003 WL 124678, at *3.

Finally, "[a] person may give consent even if the person is in custody." *Amry*, 2003 WL 124678, at *4 (citing *Watson*, 423 U.S. at 424-25) (other citation omitted) (finding that "[t]he coercion inherent in an arrest does not prevent a person from voluntarily consenting to a search").

B. Application

In the present matter, Defendant seeks to suppress the evidence extracted from his iPhone because his consent to the search "was not a free and unrestrained choice." *See* Dkt. No. 36-1 at 4. Specifically, Defendant identifies the following factors which, he believes, demonstrate that his consent was involuntary: (1) Defendant's age (twenty years old), (2) Defendant's lack of knowledge of the United States criminal justice system, (3) Defendant's limited formal education, (4) Defendant's limited knowledge of the English language, (5) the fact that Defendant had not slept in 28 hours, (6) the fact that the consent occurred while Defendant was in custody, and (7) the fact that Defendant had recently been involved in a serious traffic accident. *See id.* The Government maintains that Defendant's consent was voluntary. *See* Dkt. No. 39 at 4-5.

Upon reviewing the totality of the circumstances, the Court finds that Defendant voluntarily consented to the search of his iPhone. When Defendant gave his consent, he was twenty years old and had a high school education, so he was not particularly vulnerable to coercion. *See, e.g.*, *United States v. Mendenhall*, 446 U.S. 544, 558 (1980) (finding that a 22 year old woman with an eleventh grade education "was plainly capable of a knowing consent"); *see*

also United States v. Olejniczak, No. 15-CR-142, 2017 WL 9485699, *6 (W.D.N.Y. Aug. 2, 2017), *report and recommendation adopted*, No. 15-CR-00142, 2017 WL 5493660 (W.D.N.Y. Nov. 15, 2017) (finding that a defendant who did not graduate from high school and struggled with reading comprehension voluntarily consented to a search based on the totality of the circumstances). Defendant's limited knowledge of the English language did not impair his ability to give consent because Agent Toledo conducted the entire interview in Spanish, and explained the consent form to Defendant in Spanish before Defendant signed it. *See* Dkt. No. 39-1 at ¶¶ 7-8. Additionally, Defendant does not claim that he had any physical or mental health issues when he gave his consent, even though he was in a "serious traffic accident" earlier that morning. *See* Dkt. No. 36-1 at 4. Finally, the consent was not obtained by force, threats, or other coercive conduct. *See* Dkt. No. 39-1 at ¶¶ 7, 12 (discussing how the agents wore plain clothes during the interview, never displayed their firearms, and never threatened to obtain a search warrant for the iPhone). Based on these characteristics, the Court finds that the consent to search Defendant's iPhone was "unequivocal, specific, and intelligently given." *Como*, 340 F.2d at 893.

The Government notes that two factors weigh in Defendant's favor: (1) that Agent Toledo did not advise Defendant that he could refuse to consent to the search and (2) that Defendant was in custody when he gave his consent. *See* Dkt. No. 39 at 4. In light of the totality of the circumstances, however, these factors do not tip the scale in favor of suppression. Although Agent Toledo did not inform Defendant had he could refuse to consent to the search, such information is not required to make consent voluntary. *See Drayton*, 536 U.S. at 206; *Amry*, 2003 WL 124678, at *3. Similarly, the fact that Defendant was in confinement at the time of the arrest does not prevent him from voluntarily consenting to the search, as it is well settled that a person may give their consent even when that person is in custody. *See Amry*, 2003 WL 124678, at *4;

see also Watson, 423 U.S. at 424 (noting that "the fact of custody alone has never been enough in itself to demonstrate a coerced confession or consent to search"); *United States v. Murphy*, 16 F. Supp. 2d 397, 401 (S.D.N.Y. 1998) (holding that consent given while a defendant was in custody was valid because the officers did not use force to obtain it, the defendant was intelligent and had no unusual vulnerability, and the consent form was explained to the defendant before he signed it).

Lastly, the fact that Defendant had been awake for almost 28 hours by the time he consented does not invalidate his consent. First, the Court notes that "[t]his was not a case where the police intentionally kept a suspect awake for long periods so that he would be more easily manipulated into confessing." *See Colon v. Ercole*, No. 09-CV-5168, 2010 WL 9401, *38 (S.D.N.Y. Jan. 4, 2010). On the contrary, Defendant caused his own alleged sleep deprivation. *See* Dkt. No. 40-1 at ¶¶ 5, 7 (discussing how Defendant woke up at 7:30 a.m. on August 21, 2018 and went to work, was in a car stopped by Border Patrol at 3:14 a.m. on August 22, 2018 that crashed around 3:27 a.m., fled from the crash, and evaded Border Patrol until 9:00 a.m. when he was promptly brought to the Station and interviewed). Moreover, Defendant does not claim that he ever told Border Patrol that he was tired or asked them to stop the interview. *See United States v. Guzman*, 11 F. Supp. 2d 292, 298 (S.D.N.Y. 1998) (holding that while sleep deprivation can be a tool of coercion, a statement made late at night was not coerced where there was no evidence to suggest that the defendant expressed fatigue or wanted to end the interrogation), *aff'd* 152 F.3d 921 (2d Cir. 1998); *Colon*, 2010 WL 9401, at *38 (holding that statements were voluntary where "[t]here is no suggestion that [the defendant] felt any fatigue or expressed a desire to end the interview or sleep"), *report and recommendation adopted*, 2010 WL 3767079 (S.D.N.Y. 2010); *United States v. DiLorenzo*, No. 94-CR-303, 1995 WL 366377, *8 (S.D.N.Y. June 19, 1995)

(holding that "a claim that a defendant was exhausted . . . is not, in the absence of coercive law enforcement activity, sufficient to characterize his confession as involuntary"). Therefore, Defendant's consent is not invalidated by the fact that he had been awake for the 28 hours prior.

As the Supreme Court recognized in *Drayton*, "the concept of agreement and consent should be given a weight and dignity of its own." *Drayton*, 536 U.S. at 207. Here, Defendant gave Agent Toledo his consent to search the iPhone, and it was reasonable for the Government to act in reliance on that understanding. Therefore, considering the totality of the circumstances, the Court finds that Defendant voluntarily consented to the Government searching his iPhone.

C. Request for Evidentiary Hearing

"A defendant who is moving to suppress evidence is not automatically entitled to an evidentiary hearing." *United States v. Harun*, 232 F. Supp. 3d 282, 285 (E.D.N.Y. 2017) (citing *United States v. Barrios*, 210 F.3d 355, 355 (2d Cir. 2000)). "'[A]n evidentiary hearing on a motion to suppress ordinarily is required if the moving papers are sufficiently definite, detailed, and nonconjectural' to enable a court to conclude that there are contested issues of fact." *Id.* (quoting *Jones v. United States*, 365 Fed. Appx. 309, 310 (2d Cir. 2010)) (citing *United States v. Pena*, 961 F.2d 333, 339 (2d Cir. 1992)). "Put differently, '[a]bsent a contested issue of material fact, a defendant is not entitled to an evidentiary hearing.'" *Id.* (quoting *United States v. Pierce*, No. 06-CR-42, 2007 WL 1175071, *3 (E.D.N.Y. Apr. 19, 2007)).

"Moreover, there are requirements as to what sort of evidence can create a factual dispute that would necessitate an evidentiary hearing on a motion to suppress. It is well-settled that a hearing is not required if a defendant fails to support his factual allegations with an affidavit from a witness with personal knowledge." *Id.* at 285 (citing *United States v. Mottley*, 130 Fed. Appx. 508, 510 (2d Cir. 2005)).

In the present matter, although Defendant did include a sworn affidavit in response to the Government's Opposition to the Motion to Suppress, the affidavit fails to create a contested issue of fact. Significantly, the affidavit does not challenge Agent Toledo's narrative about the interview, including that Agent Toledo conducted the interview in Spanish, explained the consent form to Defendant, and did not use force to obtain Defendant's consent. *See* Dkt. No. 39-1 at ¶ 9. Accordingly, since the undisputed facts show that Defendant voluntarily consented to the Government searching his iPhone, the Court denies Defendant's request for a suppression hearing.

IV. CONCLUSION

After carefully reviewing the entire record in this matter, the parties' submissions and the applicable law, and for the above-stated reasons, the Court hereby

ORDERS that the Motion to Suppress (Dkt. No. 36) is **DENIED**; and the Court further

ORDERS that Defendant's request for a suppression hearing is **DENIED**; and the Court further

ORDERS that the Clerk of the Court shall serve a copy of this Memorandum-Decision and Order on the parties in accordance with the Local Rules.

IT IS SO ORDERED.

Dated: March 14, 2019
Albany, New York

Mae A. D'Agostino
U.S. District Judge